IN THE HIGH COURT OF JUDICATURE AT MADRAS.

DATED: 24/04/2003

CORAM

THE HONOURABLE Mr.Justice N.V.BALASUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE T.V.MASILAMANI.

APPEAL SUIT No.1269 of 1988
and
C.M.P.No.901 of 2001.

Emaresan. ...Appellant.

-Vs-

Radha. ...Respondent.

Appeal filed under Section 96 C.P.C against the judgment and decree dated 17.3.1983 made in O.S.No.283 of 1984 on the file of Subordinate Judge, Poonamallee.

!For Appellant .... Mr.T.V.Krishnamachari.

^For Defendant .... Mr.J.I.Rajkumar Roberts

:JUDGMENT

(Judgment of the Court was delivered by N.V. BALASUBRAMANIN,J)

This appeal arises out of a suit for partition.
2.The appellant is the defendant and the respondent in the appeal is the plaintiff. The appellant and the respondent are the brother and sister and the parties are hereinafter referred to as arrayed in the plaint. The plaintiff filed the suit for partition claiming 50% of the share in the suit property and for mesne profits and for other incidental reliefs. The case of the plaintiff is that the suit property belonged to her mother Ellammal, which was purchased by her by two registered deeds of sale dated 27.5.1938 and 2.5.1939. According to the plaintiff, her mother Ellammal was in possession and enjoyment of the suit property and she has also put up superstructure and she was the absolute owner of the suit property and she was in enjoyment of the suit property till her date of death on 18.10.1976. She has stated that Ellammal died intestate leaving behind the plaintiff and the defendant to succeed to her estate and the plaintiff is entitled to half share and the defendant,her brother is entitled to the other half share in the property. She has stated that it became difficult to enjoy the property as the joint property and hence she called upon the defendant by notice dated

17.4.1979 for division of the suit property into two shares and alllot one such share to the plaintiff, which was refused by the defendant by his reply dated 29.4.1979, which resulted in instituting the suit by the plaintiff for partition.

, 3.The case of the defendant as seen from the written statement is that he has admitted that the sale deeds dated 27.5.1938 and 2.5.193 9 are standing in the name of his mother Ellammal, but his case is that the properties were purchased by his father with his own funds in the name of his wife Ellammal. In otherwords his case is that Ellammal was a benamidar of his father and the real owner of the property was his father one Raju Maistry and he has contributed the entire sale consideration for the purchase of the suit property. It is also stated that his father Raju Maistry was a washerman by profession and was doing independent business and his mother Ellammal was not carrying any profession and she was only a house wife and she has no source of income to purchase the property. It is also stated that the superstructure was put up only by their father and subsequent to the death of his father on 9.6.1948, the defendant has opened a laundry in 1968 and has been earning income through that business. It is also stated that the defendant has improved the suit property by putting up further construction and it is denied that the plaintiff and the defendant have been in joint possession and enjoyment of the suit property. It is also stated that apart from the plaintiff and the defendant, Raju Maistry had one other son and he passed away subsequently without issue and on the death of his younger brother, the suit property became the absolute property of the defendant and the property is not liable for partition.

4.On the basis of the above pleadings, the learned Subordinate Judge,Poonamallee has framed as many as four issues for consideration and on the basis of the evidence let in by the parties both oral and documentary, he held that the defendant has not proved his case that the property was purchased by his father benami in the name of her wife Ellammal. The trial court has also found that the defendant has not established that the superstructure was built up by the defendant and the trial court held that the plaintiff would be entitled to half share in the suit property and granted the preliminary decree for partition and relegated the parties to separate proceedings for the determination of the mesne profits. It is against the judgment and decree, the present appeal has been preferred.

5. We heard Mr.T.V.Krishnamachari, learned counsel appearing for the appellant and Mr.I.Rajkumar Roberts, learned counsel for the respondent.

6.The points that arise for consideration are:-

1)Whether the defendant has established that the suit property was purchased by Raju Maistry in the name of his wife Ellammal as benamidar?

2)Whether the defendant has established that he has improved the suit property by putting up superstructure over the land in question?

3).Whether the plaintiff is entitled to claim the relief of partition as prayed for?

7. We consider all the three points together. Before considering the submissions of the learned counsel for the parties, it is relevant to mention here that the trial court in the judgment has proceeded on the basis that it was the defendant's case that Raju Maistry has purchased the property out of the joint family funds and since the joint family nucleus was not established, it cannot be held to be the joint family property of Raju Maistry purchased benami in the name of his wife Ellammal. We are of the view that it is not the case of the defendant that Raju Maistry purchased the property out of his joint family funds. On the other hand, it is the definite case of the defendant that Raju Maistry purchased the property out of his own funds, which implies that Raju Maistry had purchased the property not out of the joint family funds, but out of his separate earnings. We are of the view that the trial court has proceeded on the wrong basis and decided the first issue that was framed. Though the trial court may not be correct in its approach in deciding the question on the basis that the suit property was not the joint family property of Raju Maistry, since the entire evidence is before us, we are not inclined to remit the matter to consider the same afresh.

8.Mr.T.V.Krishnamachari, learned counsel appearing for the appellant vehemently contended that the defendant has established by oral evidence that the suit land was purchased by Raju Maistry in the name of his wife Ellammal out of his own funds and he referred to the evidence of P.W.1 as well as D.Ws. 1 and 2 and submitted that the above evidence clearly show that Raju Maistry had purchased the property out of his own funds in the name of his wife Ellammal. D.W.1 in his evidence has stated that his father Raju Maistry had purchased the property by the sale of the property situated in Bazaar street obtained from his grand father on partition and has put up a superstructure over the land purchased by him. According to the evidence of D.W.1, Raju Maistry has been running a laundry shop and with the income from the laundry business, he has improved the superstructure by constructing further construction and he has stated that either for the purchase, or for the improvement of the suit property, the plaintiff or her mother has not contributed any sum. It is also stated that after the death of his mother, there was a panchayat and in the panchayat he has paid a sum of Rs.2,000/- to the plaintiff. He also referred to a mortgage executed by himself, his mother and his younger brother Subramani and he has stated in the evidence that he has paid a sum of Rs.1 0,000/- to the plaintiff and also 30 sovereigns of gold. We have gone through the evidence of D.W.1. The defendant's evidence, who was examined himself as D.W.1, does not inspire confidence for acceptance and it is also significant to note that the defendant has not produced any evidence to support his plea that his father has obtained the property from his grand father on the partition and those properties were sold, which was utilised for the purchase of the suit land in the year 1938. The defendant except his own ipsi dixit has not produced any documentary evidence either for the partition or for the allotment of some property in the so called family partition which was sold and which was utilised for the purchase of the suit land. The defendant has also not produced any evidence regarding the income

of his father and his evidence does not also show that his father was in possession and enjoyment of the property as his own till his life time . He has not produced any documentary evidence to show that his father was in possession and enjoyment of the property as his own. The defendant has referred to a mortgage, but the deed of mortgage was not produced by him before the trial court. His evidence in crossexamination does not improve his case and he has not produced any evidence for the panchayat and there is no proof for the payment of Rs.10,000/- to the plaintiff. A reading of the evidence of D.W.1 clearly shows that he would go to any extent to depose in support of the plea taken by him, but, however, there is no evidence let in by him to show that the suit property was purchased by his father in the name of his mother as a benamidar. The defendant has not stated the date of the sale of the property by his father, the amount of consideration received by him and he has not even stated the nexus between the alleged sale and the purchase of the suit property in the name of his mother. The other witness examined to support the case of benami is D.W.2. He is the paternal uncle of the defendant. He has not produced any evidence to show that there was a partition in the family between himself and his brother Raju and out of the property allotted in the partition, Raju Maistry has purchased the suit property by the sale of his property. He has also stated that a deed of partition was executed, but the said document was not produced. It is interesting to notice that learned counsel for the appellant submitted before us that the partition effected between Raju Maistry and his brother was an oral partition, while the evidence of D.W.2 is to the effect that the partition effected was by a written deed, but the document was not produced before the court. A reading of the evidence of D.W.1 and D.W.2 clearly shows that they have not established the case of benami set up by the defendant in the written statement. On the other hand, the plaintiff, who has examined herself as P.W.1, has stated that the property was purchased by her mother and she has independent source of income as a laundress and she has been in possession and enjoyment of the suit property till her life time in the year 1976 and in 1979 the plaintiff issued a notice claiming partition of the suit property, which was denied and then she filed the suit for partition. There is no dispute that the suit properties are standing in the name of Ellammal and when the defendant failed to establish the plea of benami pleaded by him, the logical consequence that would follow is the mother Ellammal is the owner of the suit property. It is also relevant to mention here that the defendant has failed in his attempt to prove that his father has constructed the superstructure over the land and he has also not produced any evidence to show that he made further improvements by additional construction. The defendant has not produced the relevant documentary evidence by way of his application to the Town Planning Authority for the necessary permission for construction over the said site, the date of construction or the amount of expenditure incurred for the construction or for the re-construction of the property. We hold that the defendant has not produced any evidence except his own

interested testimony to show that he has been in possession and enjoyment of the property as his own and the defendant has miserably failed to establish his case of benami set up by him.

9. It is well settled by the decisions of the Supreme Court

in ' Sri Rathnavarmaraja v. Smt.Vimala' (A.I.R.1961 S.C.1299), ' Surasaibalini v. Phanindra Mohan' (A.I.R. 1965 S.C.1364) and 'Jaydayal Poddar v.Bibi Hazra' (A.I.R.1974 S.C.171) and also the decision of the Division Bench of this Court in 'Ponnuswamy Nadar v. Narayanan Nadar' (1976 (1) M.L.J.1) that the burden of proof to establish the benami transaction shall lie only on the person, who pleads the same. The defendant has set up the plea of benami and it is for him to discharge the burden. The analysis of the evidence let in by him shows that he has not discharged the burden to establish the benami nature of the purchase of the property in the name of his mother. The Supreme Court also held that the following requirements are to be satisfied before deciding the question of benami.

i) sources from which the purchase money came;

ii) nature of possession of the property after the purchase;

iii) Motive, if any for giving transaction a benami colour;

iv) Position of the parties and their relationships, if any, between the claimant and the alleged benamidar;

v) Custody of title deeds after the sale; and

vi) The conduct of parties concerned in dealing with the property after the sale.

The defendant herein has not proved that his father had contributed his money towards the purchase consideration for the purchase of the suit property. As regards the possession of the property is concerned, there is no evidence that the defendant and his deceased father were in possession and enjoyment of the suit property in their own right. There is no evidence regarding the motive for the purchase of the property by his father in name of his mother. Though it is true that there exists a relationship of husband and wife, that alone would not be sufficient. As far as the custody of the document after the date of sale is concerned, the defendant has not established that his father was in possession or custody of the title deeds of the property in question. The conduct of the parties in dealing with the property also shows that the defendant has failed to establish that his father was dealing with the property as his own. Since the defendant has failed to fulfill the requirements laid down by the Supreme Court to establish the benami nature of the transaction, we hold that the plea of benami set up by the defendant deserves to be rejected and the trial court has rightly rejected the same, holding that the defendant has failed to establish the benami purchase of the property.

10. Learned counsel for the appellant has filed a petition in C.M.P.No.901 of 2001 to receive the original title deed of the suit property dated 2.5.1939 and the original mortgage deed dated 22.10.1950 as additional

documents in appeal. We are not inclined to allow the petition as the requirements of Order 41 Rule 27 C.P.C. for the production of additional evidence in the appellate Court are not satisfied. It is not a case where the trial court has refused to admit the evidence, which was sought to be marked at the trial stage. It is also not a case that the evidence was not available with the party at the time of the trial. On the other hand, the defendant in his written statement has specifically referred to both the sale deeds and in his deposition, he referred to the deed of mortgage and in spite of the same, he failed to produce the same before the trial court. The defendant has also not established the reason for the non production of the two documents before the trial court and he has also not given cogent and convincing reason for the late production of the two documents before this Court. The application for the reception of additional documents is liable to be rejected as the requirements of Order 41 Rule 27 C.P.C are not satisfied. The Supreme Court in 'N.Kalam vs. Ayyasamy' ((2001) 7 Supreme Court Cases 503) has held that the provisions of Order 41 Rule 27 C.P.C. have not been engrafted in Code so as to patch up the weak points in the case and to fill up the omission in the court of appeal and it does not authorise any lacunae or gaps in evidence to be filled up. The Supreme Court also held that the authority and jurisdiction as conferred on the appellate court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way. We are, therefore, of the view that the two documents now sought to be introduced are not essential to pronounce the judgment in the case and hence, the application is liable to be rejected on that ground.

11.Learned counsel for the appellant relied upon the decision of this court in the case of 'State .vs. R.Ranganatham Chettiar' (A.I.R. 1975 Madras 292) where this court has held that the permission to exhibit the documents should be granted after giving an opportunity to the other side at that stage, as it would result in furtherance of justice to both the parties. We are of the view that this decision is not applicable to the facts of this case, as the defendant was aware of the two documents and in spite of the same, he has not chosen to produce the same before the Court and the reception of the two additional documents at the belated stage of appeal will rather be hindrance to render justice to the affected party resulting in an unwarranted and unmerited gain to the appellant, who is in possession of the suit property by prolonging the life of litigation. Learned counsel for the appellant, however, persisted in his attempt that if this Court peruses the documents and satisfies that the interest of justice will be met by the reception of the documents, the Court may consider the petition for admission of the receipt of the documents as additional evidence. Since the learned counsel for the appellant persisted in his attempts, we perused the two documents filed before us as additional documents in C.M.P.No.901 of 2001. We have already seen that the suit property was purchased by two sale deeds, viz., 21.5.1938 and 2.5 .1939. The defendant also admitted in his written statement that there are two sale deeds dated 21.5.1938 and 2.5.1939 but the defendantappellant has produced only the document dated 2.5.1939 and has not produced the other deed of sale dated 21.5.1938 and there are no reasons or explanation for the non production of the other document. The petition has been filed to show that the defendant is in possession of the original documents, but the non-production of the document and the absence of any explanation for not producing the same during the trial indicate that he was not in possession of

the document at any earlier stage. Further, the reading of the sale deed dated 2.5.1939 also does not support the case of the defendant. Learned counsel for the appellant submitted that the profession of his father was described as a laundryman and Ellammal is described as a house wife. We also perused the document. But there are no recitals in the document to show that Ellammal was a house wife. She has been described as the wife of Raju Maistry, but that does not mean she has no profession or calling of her own. Further there are recitals in the document which was executed more than thirty years prior to the institution of the suit to show that the consideration for the purchase of the property was paid by Ellammal. We are of the view that the reception of the original sale deed dated 2.5.1939 at the late stage of hearing of the appeal would not support the case of the defendant.

12. As far as the other document is concerned, it is a deed of mortgage executed on 22.10.1950 by Ellammal and by her two minor sons, viz., the defendant and his younger brother Subramani. Though learned counsel submitted that the fact that two minors were included as parties in the deed of mortgage executed on 22.10.1950 after the death of Raju Maistry shows that minor sons have been recognised as persons having some rights or interest in the property, we are unable to accept the said submission for the simple reason that it is not uncommon to include the sons in the family, who are not interested in the property as parties in the deed out of abundant caution and more at the instance of the mortgagee to ward off any possible future dispute from such parties, who are so included in the deed without any semblance of

interest and the fact that the name of the two minor sons appear in the deed of mortgage dated 22.10.1950 per se does not show that they got some interest or right in the property.

13.The next submission of Mr.T.V.Krishnamachari, learned counsel for the appellant is that the suit is barred by limitation and therefore, the court should dismiss the suit on the ground that the suit is barred by limitation. We find no substance, in the argument as we have already held that the defendant has failed to establish that the suit property was purchased by the defendant's father Raju Maistry in the name of his wife Ellammal as a benamidar. This contention would have some force only if we have held that the property was purchased benami by Raju Maistry in the name of his wife Ellammal as benamidar. Since we have already rejected the contention of the learned counsel for the appellant that the defendant has failed to establish the plea of benami this contention is liable to be rejected even at the threshold. Even otherwise, we hold that the plaintiff has instituted the suit within twelve years from the date of death of her mother. The plaintiff has proved that the suit property was purchased in the name of her mother. She has also proved that her mother was in possession and enjoyment of the property till her date of death, viz., 18.10.1976 and only on the death of Ellammal, the succession to her property was opened and the right to succeed to her property accrued on that date. The suit was filed within 12 years from the date of death. Learned counsel submitted that the suit notice was issued on 17.4.1979 for which reply was sent on 25.4.1979 and hence he stated that the suit filed beyond three years from the date of death is barred by limitation. This submission is stated only to be rejected as after the

date of death of their mother the parties would be holding the property as co-owners of the suit property and unless it was pleaded and proved that the defendant has ousted the plaintiff, the suit instituted cannot be held to be instituted not in time. Admittedly, the suit is filed within twelve years from the date of death of the plaintiff's mother and hence we hold that the suit filed is well within time. He also submitted that the plaintiff has stated in her evidence that she got married in 1965 and from 1965 the plaintiff was excluded from possession and enjoyment of the suit property and therefore, the suit instituted on 8.6.1982 is barred by limitation. We hold that the said contention also lacks substance. The evidence of P.W.1 that she got married in 1965 does not mean that she was excluded from the family and the property from the date of her marriage. It was found that till the date of the death of the mother Ellammal, Ellammal was in possession and enjoyment of the property and only on her death, succession to the property was opened and hence the submission that the plaintiff was excluded from the family from the year 1965 and the suit filed is barred by limitation lacks substance and it is rejected.

14. Consequently, we hold that the defendant/appellant has failed to establish the plea of benami set up by him but on the other hand, the plaintiff/respondent has proved her case that the property belonged to her mother and on her death, she is entitled to half share in the suit properties and the suit for partition is maintainable in law. We also hold that the suit filed by her is not barred by limitation.

15. In the result, the appeal fails and is dismissed.

C.M.P.No.901 of 2001 is rejected. As far as the relief of mesne profits is concerned, the parties have already been relegated to separate proceedings for determination of past and future mesne profits and we are not expressing any opinion on the question though some argument was addressed before us by the learned counsel for the appellant. Since the parties are closely related, there will be no order as to costs.

Index: Yes
Internet : Yes

nyr.

To

1.The Subordinate Judge, Poonamallee
(with records).

2.The Section Officer,
V.R.Section, High Court,
Madras.